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Supreme Court, U.S.
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No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONSE OF VIAD CORP TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempts state-law tort claims concerning the design, manufacture, or material of locomotives or their parts, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926).

PARTIES TO THE PROCEEDING

Petitioners are Gloria Gail Kurns and Freida E. Jung Corson, named plaintiffs below.

Respondents are Railroad Friction Products Corporation and Viad Corp,* named defendants below.

RULE 29.6 DISCLOSURE

Respondent Viad Corp does not have a parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

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* Although sued as "Viad Corporation," respondent's correct name is "Viad Corp".

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INTRODUCTION

The Boiler Inspection Act (BIA)—first enacted in 1911, amended in 1915 and 1924, and now codified at 49 U.S.C. § 20701 *et seq.*—delegated to the Interstate Commerce Commission (and now delegates to the Secretary of Transportation) responsibility to assure the safety of "the locomotive or tender and its parts and appurtenances." *Id.* § 20701; *see id.* §§ 20701-20703.

In 1926, this Court considered the question whether a state may regulate any aspect of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," at least when there is no "conflict" between "the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 610-11 (1926). The Court's answer was unambiguous: "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613.

The court of appeals below, like every other federal court of appeals and every state court of last resort (save one) to have considered the question, followed *Napier*, and held that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a.

The court of appeals' decision is correct. The petition for certiorari nevertheless should be granted,

so this Court can affirm the court of appeals' judgment and conclusively resolve a division in the lower courts over the preemptive effect of the BIA and the continued vitality of *Napier*. Although *Napier*'s preemption holding governs in most jurisdictions, the Pennsylvania Supreme Court has refused to follow it. This split in authority has created an untenable situation for manufacturers of locomotive equipment. As this case illustrates, even out-of-state plaintiffs with out-of-state injuries can and do sue in Pennsylvania invoking that state's relatively lenient venue and personal jurisdiction rules. Thus, manufacturers can now effectively be made subject to the laws of 50 different jurisdictions (applied by Pennsylvania state courts in actions brought there), with applicable safety standards changing every time a locomotive crosses state lines. That is precisely the type of disuniformity Congress sought to eradicate through the BIA.

STATEMENT OF THE CASE

A. Statutory Background

1. Before the enactment of the BIA, "Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce." *Napier*, 272 U.S. at 608. The Safety Appliance Act did not "occupy the entire field of regulating locomotive equipment" because "its requirements are specific." *Id.* at 611.

In 1911, "Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment" by enacting the original BIA. Pub. L. No. 61-383, 36 Stat. 913. That delegation,

however, applied only to the locomotive's boiler. In 1915, Congress extended that delegation to "include the entire locomotive and tender and all parts and appurtenances thereof." Pub. L. No. 63-318, 38 Stat. 1192. The Act was again amended in 1924, Pub. L. No. 68-277, 43 Stat. 659, and remains unchanged in all relevant respects, except that regulatory authority was transferred from the Interstate Commerce Commission (ICC) to the Department of Transportation (DOT) in 1966. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931, 939.

2. The BIA—also known as the Locomotive Inspection Act (LIA)—currently delegates to the Secretary of Transportation authority to assure through regulation and inspection the safety of "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. The Act applies to "[w]hatever in fact is an *integral or essential part of a completed locomotive*," as well as "all parts or attachments definitely prescribed by lawful order" of the DOT. *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936) (emphasis added).[1]

The statute provides that a "railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... [1] are in proper condition and safe to operate without unnecessary danger of personal injury; ... [2] have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under

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[1] A "locomotive" is "a self-propelled unit of equipment designed primarily for moving other equipment," not including "self-propelled passenger cars." 49 C.F.R. § 223.5

this chapter; and ... [3] can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. § 20701. The Act broadly delegates to the Secretary authority to promulgate regulations concerning the safety of locomotives and locomotive equipment, and to assure compliance with those regulations. *Id.* §§ 20701-20702. The Secretary's authority under the BIA is not "confined to safeguarding against accidental injury," but also extends to "protection of employee health." *Urie v. Thompson*, 337 U.S. 163, 191, 193-94 (1949).

3. This Court addressed the BIA's preemptive scope in 1926 in *Napier*. Georgia and Wisconsin had attempted to impose their own particular requirements on the design of locomotives and their parts. 272 U.S. at 607. "The main question" presented was "one of statutory construction"—"whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.*

In answering that question, this Court "assumed" each state requirement "to be a proper exercise of its police power," and further "assumed ... there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only." *Id.* at 610-11 (footnote omitted).

The Court nevertheless found Congress's intention to preempt the state legislation "clearly manifested" (*id.* at 611) in the text, structure, and purpose of the BIA. The "power delegated to the Com-

mission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 613. Moreover, the fact that ICC regulations were not "inconsistent with the state legislation" made no difference, because the "fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *Id.*

The Court concluded that the BIA "was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Id.* at 613.

4. In 1970, Congress enacted the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971. The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress found that while the then-existing laws concerning railroad safety—including the BIA—"have served well" and should be "continue[d] ... without change," those laws "meet only certain and special types of railroad safety hazards." H.R. Rep. No. 91-1194, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Congress therefore expanded federal authority to all areas of rail safety, delegating to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C.

§ 20103(a). The FRSA did not, however, "subsume, replace, or recodify any acts," including the BIA. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.).

Congress also included in the FRSA a specific preemption provision, which was meant to assure that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130. The provision states in part that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The same section provides that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." *Id.* § 20106(a)(1).

6. In 1996, the Federal Railroad Administration (FRA)—the agency within DOT responsible for regulating railroad safety—reported the results of an investigation into the question of asbestos in locomotives and their parts. That report, which was ordered by Congress in 1992, determined that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf.

B. Factual Background and Procedural History

1. Between 1947 and 1974, George M. Corson was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad, and worked at various locomotive repair facilities in South Dakota and Montana. His duties included "removing insulation from locomotive boilers and putting brake shoes on locomotives." Pet. App. 3a. Corson allegedly contracted mesothelioma from his exposure to asbestos from the insulation and brake shoes. Viad is alleged to be the successor in interest of the company that allegedly manufactured the locomotives and boilers, while Railroad Friction Products Corporation (RFPC), the other respondent here, allegedly distributed the brake shoes (i.e., "parts and appurtenances" of the locomotive itself, 49 U.S.C. § 20701).

2. On June 13, 2007, Corson and his wife, Freida E. Jung Corson, filed a complaint against numerous defendants in the Court of Common Pleas of Philadelphia County, alleging state-law tort claims. Corson passed away during the pendency of the litigation, and the personal representatives of his Estate, Gloria Kurns and Freida Corson, were substituted as party plaintiffs and are the petitioners here.

Many of the defendants, including respondents Viad and RFPC, moved for summary judgment on various grounds. Viad's motion argued that Corson's state common-law claims were preempted by the BIA. The Common Pleas court denied Viad's and RFPC's summary judgment motions in a one-sentence order, although it granted summary judg-

ment as to several other defendants on other grounds.

3. On May 13, 2008, following the grants of summary judgment to some defendants and Corson's voluntary dismissal of others—including a Pennsylvania corporation whose presence in the case had precluded removal to federal court on the basis of diversity of citizenship, *see* 28 U.S.C. § 1441(b)—Viad and RFPC timely removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Viad and RFPC again moved for summary judgment on preemption grounds.

4. The district court granted the motion for summary judgment, citing *Napier*, *see* Pet. App. 25a-34a, and the Third Circuit affirmed. The court of appeals began with *Napier*, and its "hold[ing] that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field*. The broad scope of the authority conferred upon the Commission leads to that conclusion." Pet. App. 10a (quoting 272 U.S. at 613) (quotation omitted).

The "goal of the LIA," the court further explained, "is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" Pet. App. 12a (quoting *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999)). "In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the

LIA governs both the design and the construction of a locomotive's parts." Pet. App. 13a. "If each state had its own standards for liability for railroad manufacturers," the court emphasized, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." Pet. App. 13a-14a. "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." Pet. App. 14a.

The court of appeals therefore "agree[d] with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption," Pet. App. 16a, holding that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a (citing *Napier*, 272 U.S. at 611-12; *Urie*, 337 U.S. at 191-93).

The court of appeals rejected plaintiffs' reliance on the Pennsylvania Supreme Court's opinion in *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (1980), the only appellate court to hold that the BIA does not preempt the field of locomotive equipment safety. In particular, the court rejected the Pennsylvania court's view that the FRSA undermined this Court's field-preemption holding in *Napier*. Noting that the FRSA provides that "'[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practica-

ble,'" the court held that "Congress did not intend [the FRSA] to disturb the existing framework of federal preemption of the railroad industry established by the LIA." Pet. App. 20a (quoting 49 U.S.C. § 20106(a)) (first alteration and omission in original).

5. While this case was pending in the court of appeals, an intermediate Pennsylvania appellate court held in two cases that the BIA does not preempt the field of locomotive equipment safety. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009); *see also Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (relying on *Atwell*). The Pennsylvania Supreme Court denied review. *See Atwell v. John Crane, Inc.*, 996 A.2d 490 (Pa. 2010) (pet. for cert. filed, No. 10-272, August 26, 2010); *Harris v. A.W. Chesterton, Inc.*, 3 A.3d 671 (Pa. 2010) (pet. for cert. filed, No. 10-520, October 19, 2010). The defendants in both cases have petitioned this Court for certiorari. The Court called for the views of the Acting Solicitor General in *John Crane, Inc. v. Atwell*, 131 S. Ct. 552 (2010) (No. 10-272). The Court has not acted on the petition in *Griffin Wheel Co. v. Harris*, No. 10-520, which was distributed for the Conference of December 10, 2010.

ARGUMENT

The court of appeals correctly concluded that petitioners' tort claims are preempted by the BIA, and correctly adhered to this Court's decision in *Napier*. This Court should grant certiorari and affirm that judgment. The holding below is supported not only by *Napier*, but by an "avalanche of ... authority from other jurisdictions, both state and federal." *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va.

2003). The contrary view adopted by the Pennsylvania courts, however, has created an untenable situation for locomotive equipment manufacturers, which now can be forced to defend themselves in Pennsylvania courts under safety standards that vary throughout the Nation. Viad therefore agrees with petitioners that review of the question presented by this case is warranted. Viad also agrees with petitioners (Pet. 3 n.4) that of the three petitions for certiorari currently pending before the Court, this case is the best vehicle through which to consider the question presented.

A. The Court of Appeals Correctly Held that the BIA Preempts State Requirements Concerning the Design or Manufacture of Locomotives or Their Parts

1. "It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment." *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). Thus, like the court of appeals, every appellate court—other than the Pennsylvania courts—to have considered the question has held that the BIA preempts the field of safety regulation of locomotives and their parts, including claims arising out of exposure to asbestos found in locomotive parts. *See Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Oglesby v. Del. &*

Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim against manufacturer of seats is preempted by the BIA); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for lack of visual devices on a train brought against owner of train and its manufacturer is preempted by the LIA); *Darby v. A-Best Prods. Co.*, 811 N.E. 2d 1117, 1125-26 (Ohio 2004) (finding that the BIA "preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives"); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003) (BIA preempts state tort law claims against manufacturers of locomotives and asbestos-containing parts and components thereof); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts and failure to warn); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (BIA preempts railroad workers' design defect and failure to warn claims against manufacturer for asbestos-related injuries); *see also Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983).

This "avalanche of ... authority," *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, is hardly surprising. It follows directly from this Court's unambiguous holding in *Napier* that "the Boiler Inspection Act ... was intended to occupy the field" of regulation concerning the "design, the construction, and the mate-

rial of every part of the locomotive and tender and of all appurtenances," irrespective of whether any federal safety standard is "inconsistent with the state legislation." 272 U.S. at 611, 613; *see also S. Ry. Co.*, 297 U.S. at 402.[2]

The reason for broad field preemption in this area is clear. It "is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" *Law*,

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[2] Petitioners appear to contend that *Napier*'s mention of "state *legislation*" means that state common-law tort rules do not fall within the BIA's preemptive scope. Pet. 15-16. *Napier* mentioned "state legislation" because state legislation was at issue there. The argument that the BIA should be read to preempt only a state's statutory and regulatory requirements, and not its common-law requirements, is unavailing. As this Court has repeatedly explained, state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S 236, 246-47 (1959); *see, e.g., Riegel v. Medtronic, Inc.*, 552 U S. 312, 324 (2008), *Buckman v. Plaintiffs' Legal Comm* , 531 U.S 341, 352 (2001); *Geier v. Am. Honda Motor Co* , 529 U S. 861, 868-69, 872 (2000); *Norfolk S. Ry. Co v. Shanklin*, 529 U.S 344, 358 (2000); *Cipollone v Liggett Grp., Inc.*, 505 U.S. 504, 521-23 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S 481, 491 (1987). State tort claims thus interfere with the federal scheme just as surely as state legislation does, and they are preempted for the same reason.

114 F.3d at 910 (quoting *S. Pac. Transp. Co. v. Or. Pub. Util. Comm'n*, 9 F.3d 807, 811 (9th Cir. 1993)). Indeed, "[i]f each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11. *See also Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.) (three-judge court) (*Napier*'s "decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them").[3]

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[3] Even though state common-law claims concerning the design and manufacture of locomotive equipment are preempted, railroad workers injured on the job are not necessarily left without a remedy. *See Law*, 114 F 3d at 911-12. The Federal Employers' Liability Act (FELA) permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R R.*, 352 U S. 500, 506 (1957); *see* 45 U S.C. § 51 *et seq* And a worker can establish negligence per se under FELA by establishing a violation of the BIA or other rail safety statute *Urie*, 337 U S at 189. It is true that negligence per se applies only to injuries suffered while the train was "in use," *see, e g , Brady v. Terminal R.R. Ass'n*, 303 U S. 10, 11-12 (1938), and thus would not cover injuries (like Corson's) suffered while a train was in the repair shop. Pet. 24-25. But those injuries still could be remedied in a simple negligence action under FELA—the plaintiff would lose only the benefit of the special negligence per se theory. *See, e.g., Wright v. Ark. & Mo. R R. Co.*, 574 F.3d 612, 614 (8th Cir. 2009).

2. Despite this Court's clear precedent, the overwhelming weight of precedent in the state and federal courts, and the undeniable need for uniformity in the area of locomotive equipment, petitioners—and the Pennsylvania courts—argue that their state common-law claims alleging injuries allegedly sustained from the design or manufacture of locomotive parts may proceed. Petitioners' arguments are without merit.

a. Petitioners argue that this Court's subsequent precedents narrowed *Napier*, but those cases construed not the BIA, but the Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.*, which grants federal regulatory authority over specific aspects of the rail car and locomotive.[4] Pet. 16-21. The SAA precedents are inapposite. While the SAA grants federal regulatory authority over specific aspects of the rail car and locomotive, the BIA delegates to the Secre-

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Petitioners cite a string of FELA cases ostensibly showing that the BIA does not "appl[y]" to repair-shop-type claims (like Corson's) and thus cannot preempt such claims Pet. 25 Those cases have nothing to do with preemption of state law. They address the question *under FELA* of "at what point the railway becomes absolutely liable for injuries caused by defective equipment under the Act." *Angell v. Chesapeake & Ohio R.R. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). The answer under FELA—i.e., when the trains are "in use" such that a violation of the BIA (or other federal railroad safety laws) establishes negligence per se in a FELA action—is irrelevant to the question whether the BIA's delegation of federal authority to regulate locomotive equipment design and manufacture preempts state-law claims that seek to regulate the same field

[4] Rail cars are distinct from locomotives *See, e g*, 49 C F R § 232 407(a)(2) (defining "[t]rain" generally to mean "one or more locomotives coupled with one or more rail cars").

tary authority over the entire locomotive and its parts and appurtenances. There is no dispute that this case falls within the BIA's scope. And while petitioners treat the SAA and BIA as one—referring to them as the "railroad safety acts," *see, e.g.*, Pet. i—this Court has already held that their preemptive scope is not the same. As *Napier* itself explained, the SAA does not "occupy the entire field of regulating locomotive equipment" because, in contrast to the BIA, "its requirements are specific." 272 U.S. at 611.

Petitioners cite no cases *under the BIA* undermining the preemption rule enunciated in *Napier*. There are none. To the contrary, this Court expressly *reaffirmed* the holding of *Napier* more than 20 years later. *See Urie*, 337 U.S. at 192.[5]

This conflation of the two Acts leads petitioners not only to rely on the wrong precedent, but more broadly to misconceive the legal question implicated in this case. Respondents did not seek summary judgment on the basis of the SAA, and the court of appeals did not consider that question below. Thus,

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[5] Petitioners—like the Pennsylvania Supreme Court in *Norfolk & Western*—rely on *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942), as having narrowed *Napier*, Pet. 36 n.13, but that case is inapposite. *Trainmen*, which did not cite *Napier*, concerned whether a railroad must supply its employees with cabooses to ride in. 318 U.S. at 2-3. A caboose is "a car in a freight train intended to provide transportation for crewmembers," 49 C.F.R. § 223.5—not a locomotive—and the case did not involve the "design, the construction, [or] the material of [a] part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. And *Urie* reaffirmed *Napier*'s holding seven years after *Trainmen*.

the question here is not whether petitioners' tort claims are preempted by "the federal railroad safety acts," as their question presented states (Pet. i), but whether those claims are preempted *by the BIA in particular*. And contrary to petitioners' suggestion, respondents do not argue (and have never argued) that the BIA precludes "all state regulation of railroad safety." Pet. 19. Respondents only argue (and the court below only held) that the BIA preempts state law concerning the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," per *Napier*. 272 U.S. at 611.[6]

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[6] Petitioners place significance on the FRA's 1978 statement that the Occupational Safety and Health Administration (OSHA) should take a lead role in regulating many aspects of "railroad occupational safety and health." 49 C.F.R. § 221 (1978). Petitioners appear to take this statement to mean that this case should be governed by OSHA's organic statute, which contains a savings clause. *See* 29 U.S.C. § 653(b)(4). But petitioners do not and could not argue that this case falls outside the bounds of the BIA, *viz.*, the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," *Napier*, 272 U.S. at 611, and there is no plausible argument that OSHA's savings clause was intended to impliedly repeal the BIA's preemptive scope. Further, the FRA's statement concerning OSHA's responsibilities specifically emphasized that FRA would retain responsibility over "hazardous working conditions in those traditional areas of railroad operations in which we have special competence." 49 C.F.R. § 221 (1978). And the preamble accompanying the regulation explicitly reaffirmed that it is FRA—not OSHA—that retains primary jurisdiction over "the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations." Railroad Operational Safety &

b. Petitioners also argue that the saving clause in the preemption provision of FRSA, enacted in 1970, overrides BIA preemption and preserves all state-law claims in the absence of a directly conflicting federal regulation. Pet. 26-33. The FRSA provision states that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). That provision has no bearing the scope of preexisting BIA preemption.

Before 1970, federal regulation of railroad safety was not plenary, but was limited to "certain and special types of railroad safety hazards," like locomotive equipment (BIA) and rail car (SAA) safety. H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. Congress enacted the FRSA to "promote safety in *every* area of railroad operations." 49 U.S.C. § 20101 (emphasis added). Accordingly, Congress delegated to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety *supplementing laws* and regulations"—like the BIA—"in effect on October 16, 1970." 49 U.S.C. § 20103(a) (emphasis added).

As the statute makes clear, the FRSA was meant to supplement the BIA and other then-existing statutes, not to alter or amend such statutes. Indeed, as then-Judge Kennedy explained, the FRSA did "not subsume, replace, or recodify any acts." *Marshall v.*

Health Standards; Termination, 43 Fed. Reg. 10,583, 10,587 (Mar 14, 1978).

Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983). To the contrary, Congress believed that then-existing laws like the BIA "have served well" and should be "continue[d] ... without change." H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. "The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Marshall*, 720 F.2d at 1153. The FRSA's preemption provision thus allows states to continue to regulate in areas where states have always regulated until the federal government says otherwise, but has no effect on areas previously preempted by federal law, like regulation of locomotive equipment.[7]

Petitioners' contrary reading would violate the "cardinal rule ... that repeals by implication are disfavored." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)) (quotation omitted; omission in original). And it would undermine the FRSA's express command that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent prac-

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[7] *Marshall*'s analysis is supported by the FRSA's legislative history. The preemption provision was meant to assure that "*[e]xisting* state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130 (emphasis added). But there were no "existing" state rules "in force" concerning the design and manufacture of locomotives and their parts in 1970, because this Court had held the BIA to have preempted that entire field in *Napier*.

ticable." *Id.* § 20106(a)(1); *see also* H.R. Rep. No. 91-1194, at 12, *reprinted in* 1970 U.S.C.C.A.N. at 4116 ("[I]t is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable"). Granting federal regulatory authority over areas of railroad safety previously outside the bounds of federal authority went a long way toward accomplishing that goal compared to what came before, even though some interstitial state regulation would remain. But allowing states to regulate in an area where they had *not* regulated before—like the design and manufacture of the locomotive and its parts—would undermine rather than further the purpose of federal uniformity.[8]

c. Finally, petitioners urge this Court to "abandon[] the doctrine of implied federal field preemption," Pet. 36, and instead apply the conflict preemption principles set forth in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). This Court should decline petitioners' invitation.

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[8] Petitioners also rely on a later-enacted portion of the preemption provision, 49 U.S.C. § 20106(b)(1), which states that "[n]othing in this section be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party" "has failed to comply with" a federal standard, "its own plan, rule, or standard that it created pursuant to" an order of a federal regulator, or "with a State law, regulation, or order that is not" preempted under subsection (a). But that provision does not apply to "causes of action arising from events or activities occurring [before] January 18, 2002," *id.* § 20106(b)(2), far after the relevant events in this case are alleged to have taken place. And petitioners' claims do not allege that respondents violated any federal standard or any state "law, regulation, or order." They instead assert that respondents violated state common-law requirements.

To begin, nothing in *Wyeth* undermines this Court's long-standing view that "[p]re-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). *Wyeth* was purely a conflict preemption case, *see* 129 S. Ct. at 1194, as the defendant had abandoned its field preemption argument before the lower court, *id.* at 1192, and did not call into question the long-recognized doctrine of field preemption.

Petitioners' call to abandon *Napier* is particularly unsound because that decision "is one of statutory construction," 272 U.S. at 607, and "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Congress has not altered the BIA in any relevant way since *Napier* was decided in 1926. And even if *Wyeth* did "represent a turn in the course of the law" of field preemption, *id.* at 138—which it did not—this Court has repeatedly rejected abandoning its statutory interpretation precedent, irrespective of whether it would decide the case the same way today. *See, e.g., id.* at 138-39; *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008).[9]

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[9] Even if the conflict-preemption principles of *Wyeth* did apply here, the judgment of the court of appeals should be affirmed. First, *Wyeth* relied in large part on the presumption against preemption. 129 S. Ct. at 1194-95. But that presumption does not apply where, as here, the field historically has

In sum, the court of appeals correctly found that the BIA preempts the field of locomotive equipment regulation, as this Court held in *Napier*.

B. Certiorari is Nonetheless Warranted Because Rulings from the Pennsylvania State Courts Directly Conflict with the Decision Below on This Recurring Issue of National Importance

1. Contrary to the "avalanche" of federal and state court precedent discussed above, the Pennsylvania Superior Court—an intermediate state appellate tribunal—recently held in two cases that state

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been dominated by federal rather than state regulation. *See United States v. Locke*, 529 U.S. 89, 99 (2000). State regulation of locomotive equipment has been wholly preempted since *Napier* was decided in 1926. And Congress's refusal to amend the BIA in the more than eight decades since *Napier* suffices to manifest its intent to preempt state regulation of locomotive equipment.

Further, there is "clear evidence," *Wyeth*, 129 S. Ct. at 1198, that allowing state tort claims based on asbestos exposure would conflict with the federal regulatory scheme. In particular, contrary to petitioners' assertion that "the FRA has never addressed asbestos," Pet. 34, the FRA expressly decided *not* to regulate asbestos in locomotives. In a September 1996 Report to Congress—mandated by Congress four years earlier—the FRA found unequivocally that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf. Thus, even if petitioners were correct and *Napier*'s overall field-preemption holding is no longer good law, petitioners' asbestos-related claims would still be preempted

tort law claims of railroad workers are not preempted by the BIA. In *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), the Pennsylvania Superior Court rejected BIA preemption of state common-law claims, following the Pennsylvania Supreme Court's 1980 decision in *Norfolk & Western* that the BIA did not preempt the field of the design and manufacture of locomotives and their parts. The reasoning in *Atwell* was subsequently adopted *in toto* by *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010).

Despite the urging of the Superior Court,[10] the Supreme Court of Pennsylvania declined to hear appeals in both cases. *Atwell*, 996 A.2d 490; *Harris*, 3 A.3d 671. As a result, and despite more than two dozen appellate decisions from other jurisdictions since *Norfolk & Western* that have found BIA field preemption in the circumstances here presented, the Pennsylvania state courts will continue to follow that decision unless constrained by this Court.

This division in authority is intolerable. Railroads and locomotive equipment manufacturers will be subject not only to Pennsylvania standards, but also to the standards of any other state whose law might apply in an action brought in a Pennsylvania

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[10] *See Atwell*, 986 A.2d at 894 n.9 ("The decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it.")

court.[11] That is precisely the result Congress wished to avoid when it enacted the BIA.

2. The issues raised by this petition are both pressing and recurring, as the large number of courts to have already considered the question presented demonstrates. Indeed, hundreds of cases involving similar issues are pending in the Multi-District Asbestos Litigation Part for the Eastern District of Pennsylvania.

This backlog of cases is likely to grow in the future, as the conflict created by the Pennsylvania state courts encourages plaintiffs to forum-shop their claims into the Pennsylvania courts. Plaintiffs certainly will do their utmost to find a basis for commencing their cases in Pennsylvania state court and for immunizing their pleadings from removal. Under Pennsylvania law, a plaintiff may bring an asbestos-related tort claim in the state's courts, even if no part of the claim arose in the state, so long as the defendant "regularly conducts business" in the county in which the suit is filed. Pa. R. Civ. P. 2179(a)(2) (governing venue for claims against corporations). And because Pennsylvania is a hub for the railroad industry, most railroad operators and locomotive parts manufacturers regularly conduct business in the state. As a result, a disproportionate number of future claims are likely to be brought in Pennsylvania and allowed to proceed because of that

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[11] The question whether the BIA preempts state law is itself a question of federal law, not state law, and Pennsylvania courts will therefore continue to apply their view of federal preemption, even if another state's substantive law applies as the rule of decision

state's courts' anomalous and incorrect interpretation of the BIA's preemptive scope.

C. This Case Presents the Most Appropriate Vehicle to Decide the Question Presented

Of the three petitions under consideration for review by this Court, this one provides the best vehicle for resolution of this important issue. Counsel for the petitioners here, who also represents the respondents in *Atwell* and *Harris*, agrees that "the issue is better presented in the instant case." Pet. 3 n.4.

The petition here presents the question of BIA preemption in a clean factual and legal context. Viad's alleged predecessor in interest manufactured the locomotive itself and its boilers—the very equipment at the heartland of the BIA. The defendants in *Atwell* and *Harris* supplied only gaskets and brake shoes, which could raise factual questions about application of the BIA. The *Atwell* trial court, in fact, found that the parts at issue there are not "appurtenances" of a locomotive under the BIA. *Atwell*, 986 A.2d at 892. And the *Harris* petitioners added the preemptive scope of the SAA to their question presented (*Griffin Wheel Co. v. Harris*, No. 10-520, Pet. for Cert. at i), potentially diluting the focus on BIA preemption and the continued vitality of *Napier*.

Further, the *Atwell* opinion issued by the Pennsylvania Superior Court rests almost entirely on the precedential effect of *Norfolk & Western*, a three-decade old Pennsylvania state court decision that predates and is inconsistent with the settled law of all other jurisdictions, and includes little independent analysis of current case law. And there is no

opinion in *Harris*, merely a citation to *Atwell*. The Third Circuit's opinion in this case, by contrast, reflects a comprehensive and careful analysis of the issues—a much better framework for evaluating the question common to all three cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment should be affirmed.

Respectfully submitted,

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